



JOEL NECKERS

Wheeler Trigg O'Donnell

Specialties:

Class Actions, Commercial Litigation

JESSICA FOLKER
LAW WEEK COLORADO

In a year when virtual courtroom fumbles have gone viral, Joel Neckers quickly mastered the art of the remote trial. The Wheeler Trigg O'Donnell partner won one of the country's first fully remote trials in May, an achievement he said has been "one of the biggest victories of [his] career so far."

His client in the case was United Power, a Brighton-based rural electric cooperative that wanted to exit its contract with Tri-State Generation and Transmission to gain access to cheaper power on the market, more flexibility and more options for

greener and cleaner energy, according to Neckers. United Power offered \$235 million as an "exit fee," but Tri-State demanded \$1.25 billion to leave the agreement, and United Power filed a complaint with the Colorado Public Utilities Commission.

Neckers, who served as co-lead counsel for United Power, was set to try the case in March 2020, but COVID-19 had other plans. The trial was moved to May, giving Neckers a little over a month to adapt his team's approach for a new virtual format. According to colleagues, Neckers experimented with the videoconferencing software and extra tablets, headphones and other equipment to

"I think that's part of what being outside counsel is, it's part of being what a good trial lawyer is — peering around the corners and understanding what's coming down the pipe."

prepare for the "inevitable hiccups" that happen with virtual meetings.

"The overarching lesson ... is that you can be equally as effective in a video trial as you can in person," Neckers said. "It's just a matter of changing your mindset and being willing to be flexible and adapt."

The three-day trial included testimony from 11 live witnesses and the presentation of thousands of pages of documents, and a big part of preparing for virtual trial involved experimenting with different ways of presenting the witnesses and evidence. Neckers became so adept at using the technology that opposing counsel asked him to display their own exhibits during witness examinations, "which I was happy to do to help make the trial run efficiently and smoothly," he said.

United Power prevailed, making it possible for the cooperative to leave Tri-State. In addition to being one of the country's first remote trials, the trial was one of the first involving a cooperative seeking to exit a generation and transmission association, according to a WTO news release, and "[g]oing forward, electric cooperatives, courts, and regulators across the nation will look to Colorado for guidance as these disputes escalate."

Neckers also helped an alternative energy company prevail in a case involving former employees who had embezzled more than \$750,000 from the client.

The client won on summary judgment following a remote preliminary injunction hearing.

"It's an important case for the client simply because they have a lot of employees all over the place," Neckers said. "And when someone steals

money from them — and that's exactly what happened — you need to make sure people are held to account for that, so it doesn't happen again."

In addition to his virtual courtroom wins, Neckers said anticipating COVID-related legal issues and quickly bringing clients up to speed on them has been one of his proudest accomplishments of the past year. "I think that's part of what being outside counsel is — it's part of being what a good trial lawyer is — is peering around the corners and understanding what's coming down the pipe," he said.

Neckers grew up in Michigan, where his father was a commercial litigator. One of his earliest childhood memories is being asked what he wanted to do when he grew up and saying, "I want to be an 'oiler' like my dad." "I grew up with him as an example and a cousin and an uncle who were lawyers," he said, adding he never really thought he would do anything else.

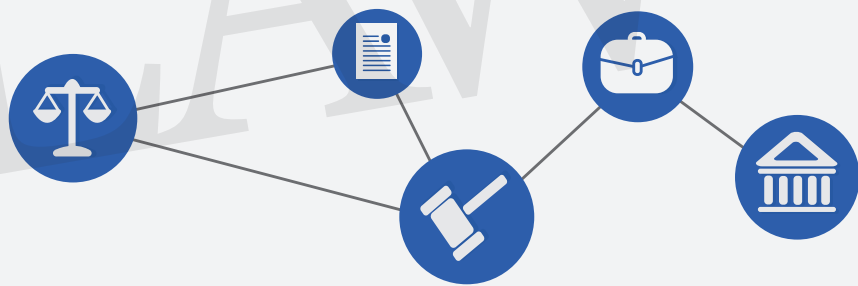
He earned a law degree from the University of Michigan Law School in 2004, clerked for a federal judge in Michigan and then worked for a big firm in Chicago for three years before joining WTO in 2008. The move to Denver was largely motivated by personal interest and family ties, Neckers said, and the city "offers a good platform to have both a local and national practice."

Neckers has a broad practice that includes commercial litigation, class actions, medical malpractice and professional liability defense. Colleagues praise his relentless work ethic and

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den before a decision on the merits.” He also concluded that the state employee’s affidavit did not “tie any alleged reduction in federal enforcement — and thus any potential increase in Colorado’s enforcement burden — to the jurisdictional changes under the NWPR.”

The 10th Circuit’s decision does not end Colorado’s litigation against the NWPR. Weiser can continue to argue a violation of the Administrative Procedure Act, Clean Water Act, and National Environmental Policy Act. Weiser told Courthouse News that he is “disappointed with the court’s ruling.” The attorney general declined to comment about whether his office will ask the en banc 10th Circuit to revisit the injunction question or seek review of Baldock’s opinion by the Supreme Court. Instead, Weiser said only that his office will examine the 10th Circuit’s ruling “in the coming days and determine how best to protect Colorado’s water” and that he hopes President Joe Biden’s administration “will take a more sensible approach to this critical issue.”

Estrin said he does not think that a court will remand NWPR to EPA even if the agency asks it to do that. “They will likely need to either repeal that rule or

have a court vacate it.” On the other hand, he predicted newly-confirmed EPA administrator Michael Regan is likely to make replacement of NWPR a high priority. “They understand that it is the most dramatic rollback of authority in the history of the Clean Water Act,” Estrin said.

Even if Regan does move quickly to eliminate NWPR and restore a broader jurisdictional reach of EPA under the Clean Water Act, the nation may be able to avoid the policy ping-pong ball of restrictive definitions of “waters of the United States,” only if Congress addresses the problem.

“I object to the whole notion that you should be looking at [the waters of the United States phrase] in terms of navigable waters,” Squillace said. “The legislative history could not be more clear on this point.”

Squillace said that, in the case of the Clean Water Act, judges can look to the “gold standard” of a record of Congress’ intention when it enacted the law. “It was what we call a conference report, so it was the final report from Congress after both houses have agreed to the final text,” he said. “We consider that to be the best of the best of legislative history.” In that report, according to Squillace, Congress “said they intended the broadest possible constitutional



The 10th Circuit Court of Appeals overturned a ruling that shielded Colorado from changes to an EPA law that now open up non-navigable waters to possible pollution. / **CLAUD RICHMOND, UNSPLASH**

interpretation of that phrase.”

Estrin remarked that the urgency of a legislative response may be more pronounced given the increasingly hostile attitude of some federal judges to the Clean Water Act. “In earlier decisions going back to the ’70s and ’80s, courts seemed much more attuned to what Congress intended, that it was meant to

be this all-encompassing federal [law] that regulated every discharge,” he said. “We’ve seen this much more nit-picking review of a lot of the provisions. It almost seems that they’re looking for ways to find that the act doesn’t apply rather than to accomplish what Congress clearly intended.” •

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JOEL NECKERS

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“superhuman” efforts, and one WTO partner said, “We often joke that he may not

actually be human, but in fact

a cyborg terminator sent from the future.” His nomination form noted that in addition to working the long hours typical of high-powered litigators, Neckers once visited dozens of “musty basements” around the country searching for

evidence in a case involving alleged defects in washing machines.

Somehow, he still finds time to serve the community. Since 2009, Neckers has volunteered with the Colorado Coalition for the Homeless. He was recently elected chair-

man of the board and will oversee CCH in that role for a three-year term, and he has previously served as vice chair, provided pro bono legal counsel and planned fundraisers for the organization. •

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DUNCAN GRIFFITHS

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did have the heated emotional issues of a divorce. The issue arose after his client’s longtime business partner transferred the ownership interests in the company to his wife in their divorce.

“He didn’t go into business with [his partner’s] wife, she didn’t know home health. Can they even legally do this?” Griffiths said. “To my client’s detriment, he tried to make it work.” However, the situation became untenable after the new business partner started to come to work

in the office and went as far as changing locks and dismissing an office manager so she could run the business.

Griffiths said to his client’s chagrin, his former business partner was legally able to transfer his interest in the company to his ex-wife, but the case focused in on the question of whether he could legally transfer a director position as well. The court found that in order to become a shareholder, you must be elected by a majority of other shareholders — and with just two business partners, both would have to agree. Griffiths said it wasn’t a significant case in terms of its impact but

was a major case for his client.

“I enjoy substantive areas that I practice in,” Griffiths said. “That’s the fun thing about being lawyer — learning the underlying substance for other professions.

In this case home health care.” He started his career in construction defects litigation, but he and his brother eventually joined their mother’s law firm. He has since focused his practice on commercial litigation and said he specializes in cases that involve issues with forensic accounting.

As a litigator, he seeks to apply his

own business and finance understanding but also to spend his time doing homework on the businesses and the issues involved in the cases he takes on so he can work with expert witnesses in a trial to build his case or dissect his opponents’.

And in the cases he takes on, he said he’s moved by representing an underdog. “I like the cases where there’s an uphill battle,” he said. “I’m not afraid to lose a case if I feel like it’s righteous enough or is worth the chance. The judge isn’t always going to agree with my client’s position, but I take the cases that move me.” •

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COURT OPINIONS

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proceeds evenly distributed to her two daughters. One of the decedent’s daughters contended she made a valid claim for the residence under the terms of the will. The district court disagreed because the demand did not comply with section 15-12-804 of the 2020 Colorado Revised Statutes.

A division of the Colorado Court of Appeals concluded the district court erred because section 15-12-804 applies only to a creditor’s claim against an estate and does not apply to a devisee’s demand for a devise under a will. The division reversed the district court’s order approving the final set-

tlement of the decedent’s estate and remanded for further proceedings.

Jerud Butler v. Board of County Commissioners for San Miguel County

A division of the Colorado Court of Appeals considered whether the Lawful Activities Statute — which prohibits an employer from “terminat[ing] the employment of any employee” due to the employee’s lawful off-duty conduct — applies to an employee’s demotion to another position with the same employer.

The division concluded it does not. The division also considered whether the Freedom of Legislative and Judicial Access Act — which prohibits an employer from taking any action against an employee for testifying be-

fore a committee of the General Assembly or a court or for speaking to a member of the General Assembly at the committee’s, court’s or member’s request — applies to an employee’s voluntary testimony as a witness in a court proceeding without a court order, subpoena or other formal request by a judicial officer.

The division concluded the statute may apply when a party or a party’s attorney calls an employee to testify as a witness in a court proceeding and a judge, magistrate or other judicial officer allows the testimony.

The division affirmed the trial court’s dismissal of Butler’s Lawful Activities Statute claim, reversed the trial court’s entry of summary judg-

ment on the Access Act claim and remanded for further proceedings.

People in the Interest of My.K.M.

V.K.L. and T.A.M. appealed the juvenile court’s judgment terminating their parent-child legal relationships with My.K.M. and Ma.K.M. V.K.L.’s appeal presented an issue of first impression in Colorado: whether enrollment in a tribe, or merely tribal membership absent enrollment, determines whether a child is an Indian child under the Indian Child Welfare Act of 1978.

A division of the Colorado Court of Appeals held that a child’s membership in a tribe, even absent eligibility for enrollment, is sufficient for a child to be an Indian child under the ICWA. •